80-1410

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CLERK

In The

Supreme Court of the United States

October Term, 1980

No. .....

E-SYSTEMS, INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND ITS LOCAL 848,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals and the District Court erred by failing to properly consider and apply rules and standards for summary judgment proceedings as laid down in decisions by this Court.

II.

Whether the Court of Appeals and District Court below erred in entering a summary judgment based solely on general wording in a recognition clause when there existed a genuine fact issue as to whether the parties had intended to eliminate such matters from the contract.

III.

Whether the Court of Appeals erred in affirming a lower court decision in which a question of union representation was placed before an arbitrator and not before the National Labor Relations Board.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, E-Systems, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 8, 1980.

OPINIONS BELOW

The Memorandum Opinion of the District Court for The Northern District of Texas, entered on March 6, 1980, is reproduced in Appendix A (Pages A-1 - A-3). The opinion has not been officially reported. The Opinion of the Court of Appeals for the Fifth Circuit dated December 8, 1980 is reported at 632 F.2d 487 (5th Cir. 1980) and is repro-

duced in Appendix A (Pages A-5 - A-9). A Petition for Rehearing was denied on January 8, 1981 and is reproduced in Appendix A (Page A-11). Petitioner's Motion for A Stay of the Issuance of the Mandate was granted on January 22, 1981 and is reproduced in the Appendix (Page A-12).

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether the Court of Appeals and the District Court erred by failing to properly consider and apply rules and standards for summary judgment proceedings as laid down in decisions by this Court.

II.

Whether the Court of Appeals and District Court below erred in entering a summary judgment based solely on general wording in a recognition clause when there existed a genuine fact issue as to whether the parties had intended to eliminate such matters from the contract.

III.

Whether the Court of Appeals erred in affirming a lower court decision in which a question of union representation was placed before an arbitrator and not before the National Labor Relations Board.

STATEMENT OF THE CASE

This case arises out of an attempt by the International Union, United Automobile, Aerospace and Agricultural

Implement Workers of America, UAW and its Local Union 848 (hereafter called "Respondents") to bring employees of a new division of E-Systems, Inc. (hereafter called "Petitioner") under union representation by arbitration of alleged grievances under an existing collective bargaining agreement with another division.

Petitioner is a corporation engaged in the electronics and avionics industry with operations throughout the United States. Historically, Petitioner has conducted its operations through separate and distinct divisions which operate totally independent of one another. Among the divisions currently operating in the Dallas, Texas area are Petitioner's Garland Division, the Commercial Division, the Greenville Division and the parent-entity, the Corporate Division. The operating divisions are and at all times during their existence have been independent operating units, wholly unrelated to one another in any operational sense. Each division conducts its own personnel and employment activities including, but not limited to, all collective bargaining carried on for the division's personnel. Divisions, such as the Garland Division, which have employees represented by a union, negotiate and enter into their own collective bargaining agreement without reference as to what may or may not be done in another division. Indeed, the Petitioner, as the corporate entity, does not even appear as a signatory party on such collective bargaining agreements.

Prior to 1971 Petitioner's Garland Division conducted part of its operations at separate facilities located in Arlington, Texas. Because of the integrated operations and the fact that the Arlington facilities were directly under the administration and control of the Garland Division management the collective bargaining agreement between Respondents and the Garland Division covered employees at the Arlington facility.

In 1971 the Arlington plant facilities were shut down, with all operations ceasing and the work that had been done there was moved either to the Garland, Texas plant or to a new division which was established in Utah. When the Arlington facilities were closed the Garland Division lost all control and responsibility for those facilities and had nothing further to do with them. There were no operations of any kind conducted at the Arlington facilities for several years by Petitioner or any of its divisions.

Shortly after the closing of the Arlington facilities Petitioner's Garland Division and Respondents entered into a new collective bargaining agreement. As part of that agreement the parties agreed to delete all references to the Arlington facilities and agreed that those facilities were not part of the collective bargaining unit. As an addendum to the new collective bargaining agreement which was executed in February 1972, the Garland Division and Respondents entered into a letter of understanding by which they agreed that if the Garland Division resumed its operations at the Arlington facilities then, and only then, the plant personnel would be covered by the collective bargaining agreement between the Garland Division and Respondents. (App. B. pg. B-5).

Subsequently, during negotiations for a collective bargaining agreement to succeed that of the 1972 contract, the Garland Division and Respondents agreed to delete even the letter of understanding from the contract and since that time it has not been part of any collective bargaining agreement covering the Garland Division.

In 1977 Petitioner established a new operating division independent of the Garland or any other operating division. The new division, known as the Commercial Division, took

over the still unused Arlington facilities and as of this time it is conducting its operations there. At all times the Commercial Division and the Garland Division have been totally independent of one another as operating units, each Division having its own management and conducting its own personnel policies and practices.

Respondents were informed in 1977 of the establishment of the Commercial Division and the fact that it would be operating out of the old Arlington facilities. Despite this knowledge Respondents did not at any time seek to negotiate as to any matter concerning personnel or operations of Commercial Division or the Arlington facilities even though a new collective bargaining agreement was negotiated in 1977 covering Garland Division's personnel.

In October 1978 Respondents presented the management at the Garland Division with a "grievance" which amounted to a demand that the Garland collective bargaining agreement be extended to the Commercial Division's Arlington plant and that Respondents be recognized as the bargaining agent for employees at those facilities. (App. B, pg. B-4). This grievance was rejected on the grounds that it was not a contractual grievance but an attempt to extend union representation without compliance with the National Labor Relations Act. In February 1979 Respondents demanded arbitration of the matter and Petitioner's Garland Division management refused. Thereafter, Respondents filed this lawsuit.

Petitioner responded to the Original Complaint of Respondent by filing motions to dismiss asserting, among other things, that it was not a proper party since it was not a party to the collective bargaining agreement between Garland Division and Respondents and that the matters

in question were representation matters within the jurisdiction of the National Labor Relations Board. Shortly thereafter Respondents filed a Motion for Summary Judgment which was opposed by Petitioner. Among the materials presented to the Court in response to Respondents' Motion for Summary Judgment was an affidavit, in due form, setting forth the facts outlined above. At no time were these facts disputed by Respondents by affidavit or otherwise. On March 6, 1980 the District Court, after an informal hearing in chambers, filed a Memorandum Opinion granting Respondents' Motion for Summary Judgment based on general language contained in the recognition clause of the collective bargaining agreement then in force and effect. The District Court also made a specific finding that the Arlington facilities operated by Petitioner's Commercial Division, based on the wording of the recognition clause, were covered by the collective bargaining agreement. The District Court completely ignored the undisputed facts presented by Petitioner establishing that the parties had intended to delete all matters related to the Arlington facilities from its collective bargaining agreements.

Petitioner timely appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. On appeal, the Court of Appeals reversed the District Court's findings that the Arlington's facilities were covered by the Garland Division collective bargaining agreement but affirmed the summary judgment insofar as it directed Petitioner to arbitrate the alleged grievances. Petitioner timely filed a Petition for Rehearing and on January 8, 1981 that Petition was denied.

FEDERAL JURISDICTION

Jurisdiction in the United States District Court for the Northern District of Texas was predicated on § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

REASONS FOR GRANTING THE WRIT

The decisions below raise important questions as to the proper balance to be struck between the strong, well defined principles of law related to summary judgments and the doctrine which the Courts have ennunciated favoring in general the concepts of arbitration. The importance of the questions is increased by the fact that the ultimate issues involve possible compulsory union representation without consent, a concept which is anathema to the entire body of federal labor law. Petitioner will not be so hypocritical as to hide behind that point, however. Petitioner also asserts its own rights as a legal and contracting entity to have the benefits of its contracts and its day in Court, both of which thus far have been denied.

Plainly stated, the decisions below conflict with the decisions of this Court and of the Court of Appeals for the Fifth Circuit as to the law and standards to be applied in considering motions for summary judgment. The Courts below had before them undisputed evidence that the parties had intended to delete from the collective bargaining agreement the very language relied on in entering the summary judgment. This raises at the very least serious questions of ambiguity which cannot be resolved by summary judgment proceedings.

The decisions below conflict with the decisions of this Court as to the proper role of the courts in cases seeking to compel arbitration. The Courts below failed to determine

whether the parties had in fact agreed to arbitrate matters related to the coverage of the Arlington facilities and gave that judicial function to the arbitrator.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS AND PROCEDURES TO BE USED IN CONSIDERING A MOTION FOR SUMMARY JUDGMENT.

The standards for judicial review of a summary judgment decision are essentially the same as the standards for initial consideration of a motion for summary judgment. Thus, both of the Courts below should have determined first whether a genuine issue of material fact exists and, second, whether Respondents were entitled to judgment as a matter of law. All evidence and pleadings and inferences drawn from them must be construed in the light most favorable to the party opposing the summary judgment. See, e.g., *United States v. Diebold, Inc.*, 369 U.S. 654 (1962); *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *BAW Mfg. Co. v. Saks Fifth Avenue, Ltd.*, 547 F.2d 928 (5th Cir. 1977).

Despite the existence of these long established principles and rules, both of the Courts below ignored clear evidence which at least placed in doubt the very language on which the summary judgment was based. In their opinions, the Courts below stated that the summary judgment entered against Petitioner was based on language in the recognition clause of the Garland Division's contract, that clause supposedly extending coverage to certain employees at the Arlington plant. In relying solely on this language, the Court below completely ignored the uncontroverted affidavit presented by Petitioner that such coverage had been

negotiated out of the contract at a later date. The District Court also ignored the evidence contained in Petitioner's affidavit that the Respondents had surrendered even the limited right of re-entry into Arlington contained in the February 1972 letter of understanding. Without a doubt, these are material fact questions which go to the very heart of the issue of arbitrability of contract coverage. Needless to say, if the language upon which the lower Court relied upon is shown to have no affect then all previous orders mandating summary judgment must fall.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE DUTY OF THE COURTS IN DETERMINING WHETHER A COLLECTIVE BARGAINING AGREEMENT COMPELS ARBITRATION.

This Court decided long ago that in a Section 301 action to compel arbitration the question of substantive arbitrability, i.e., did the parties agree to arbitrate the issues in question, is for the courts and not the arbitrator. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962); accord *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In other words the courts' duties go to basic principles of contract law governing the existence of an agreement.

The Court ignored other equally important evidence pointing to the existence of material fact issues as to the substantive arbitrability of the grievances alleged by Respondents. First, there is the language of the first grievance itself. (App. B, pg. B-4). It could not be more clear that the intent of Respondents is to expand the coverage of the collective bargaining agreement in question to a new unit without the benefit of an election or even a demand

to bargain. Secondly, the Court failed to consider the letter of understanding of February 3, 1972, an agreement that specified that the parties had negotiated references to the Arlington plant out of the contract. That letter and the events surrounding it certainly raised material issues as to whether the language relied on by the District Court even existed in a contractual, legal sense.

Had the District Court considered all of the material before it, it is totally inconceivable that the summary judgment would have been entered. It cannot be gainsaid that a very serious question and certainly a material one, existed at that time and still exists as to whether there is any contractual obligation to arbitrate any matter involving the coverage of the Arlington plant under the contract in question. It is for the Courts and not an arbitrator to determine whether the parties agreed that the matter in question was or was not part of the contract. In granting and affirming the grant of the motion for summary judgment the Courts below have forced that issue onto an arbitrator, an action clearly in conflict with earlier decisions of this Court.

The issuance of a summary judgment order is a harsh remedy and is to be done sparingly and only after proper analysis of the case as a whole and due consideration of all of the evidence and pleadings. It is apparent that the Courts below failed to give such consideration. But this failure is even more glaring when it is connected with the failure to carry out the judicial function of the courts in a proceeding of this type and evident deferral to an arbitrator.

CONCLUSION

For the reasons set out herein, a writ of certiorari should be issued to review the judgment and opinion of the Court below.

Respectfully submitted,
SMITH, SMITH & FLORSHEIM

By _____
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OF COUNSEL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Petitioner's Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit were served on Counsel for Respondents by deposit in the United States Mail with sufficient postage thereon for delivery on the .... day of February 1981, addressed to:

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Bowen L. Florsheim

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AND ITS LOCAL UNION 848

VS.

E-SYSTEMS, INC.

CA-3-79-0255-C

MEMORANDUM OPINION

This is an action seeking to remedy a violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce. Jurisdiction is conferred by 29 U.S.C. § 185(a).

Defendant E-Systems is a corporation which includes unincorporated divisions known as the Garland Division and the Commercial Division. At various times material to this case, defendant has operated facilities in Garland and Arlington, Texas.

On July 19, 1978, plaintiffs, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local Union 848 and the "Garland Division of E-Systems, Inc.," entered a three-year collective bargaining agreement. It states that the union is recognized as the exclusive collective bargaining representative of all employees designated in a National Labor Relations Board certification dated January 25, 1951, and a Memorandum of Understanding dated March 21, 1961. It further states that it covers employees holding particular job classifications. The 1961 Memorandum of Understanding

extends recognition of the UAW expressly to include employees at the Arlington facility. The collective bargaining agreement also provides for grievance arbitration of all disputes requiring "interpretation or application of [its] terms."

After not using the Arlington site as a production facility for about six years, the defendant reopened it in 1978, under the aegis of a newly-created Commercial Division.

Grievances were filed by the plaintiffs alleging contract violations in the refusal of the defendant to recognize and bargain or apply the terms of the collective bargaining agreement to the employees at the reopened Arlington facility and its layoff of certain employees at the Garland facility while new employees were being hired into the same classifications at Arlington. The defendant refused to arbitrate such grievances, and this action to compel arbitration followed.

The defendant moved to dismiss contending *inter alia* that the grievances sought to be arbitrated raised issues within the exclusive jurisdiction of the NLRB, and that the defendant is not bound to arbitrate under the agreement signed by its Garland Division. The plaintiffs moved for summary judgment.

The subject matter of the grievances is not within the exclusive jurisdiction of the NLRB, *Carey* v. *Westinghouse*, 375 U.S. 261 (1964).

The subject matter of the grievances sought to be arbitrated is within the scope of the agreement: the recognition clause provides that the UAW is exclusive bargaining representative of all covered employees, the employees covered by the agreement include employees at the Arlington facility, and the agreement establishes rules governing the order of layoff and other terms and conditions of employment.

Defendant E-Systems is bound by the collective bargaining agreement entered into by its Garland Division and therefore must arbitrate under it.

For the above reasons the Court is of the opinion that defendant's motion to dismiss should be denied, and plaintiffs' motion for summary judgment should be granted and defendant ordered to arbitrate the grievances at issue in this case in accordance with the collective bargaining agreement.

Court costs are taxed against the defendant.

Wm. Taylor, Sr.
United States District Judge

March 6, 1980
Date

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL UNION 848

VS.

E-SYSTEMS, INC.

CA 3-79-0255-C

JUDGMENT

Came on for hearing plaintiffs' motion for summary judgment and defendant's motion to dismiss in the above-styled cause and the questions having been decided and the Court having this day filed its Memorandum Opinion, the Court is of the opinion that for the reasons stated plaintiffs' motion for summary judgment should be sustained and defendant's motion to dismiss should be denied, and it is accordingly

So ORDERED.

Wm. Taylor, Sr.
United States District Judge

March 6, 1980
Date

INTERNATIONAL UNION et al.,
Plaintiffs-Appellees

v.

E-SYSTEMS, INC.
Defendant-Appellant.

No. 80-1395
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

Dec. 8, 1980.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge:

In 1951 the National Labor Relations Board certified the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as the collective bargaining representative for a unit of employees at the Garland, Texas installation of the corporate predecessor of defendant E-Systems, Inc. When E-Systems became a separate entity, it acquired in addition to the Garland facilities other facilities located at nearby Arlington, Texas. Thereafter the Arlington facilities were operated as part of the Garland Division.

In a Memorandum of Understanding dated March 29, 1961, the union and the company agreed that the employees at the Arlington facility were to be covered by the same collective agreement as the employees at the Garland facility, both being under the Garland Division of the company.

In 1971, the Arlington plant facilities were shut down. When the then current collective bargaining agreement expired, the parties in negotiation, in 1972, entered into a Letter of Understanding which stated:

> During the 1971 negotiations it was agreed that all references to the Arlington, Texas, plant would be deleted from the Collective Bargaining Agreement. This was on the basis that the Garland Division's Arlington facility . . . was discontinued during May and June of 1971.
>
> It was further agreed between the parties during these negotiations that should the Garland Division resume operations at this facility in the future, references to the Arlington plant will be returned to the Collective Bargaining Agreement concerning coverage and application of the Agreement.

On July 19, 1978, the company and the union concluded another regular three-year collective bargaining agreement. The recognition provision of this agreement, Article III, Section 1, provides:

> The Company recognizes the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local Union 848 as the sole collective bargaining agency for the employees as designated in the N.L.R.B. Certificate dated January 25, 1951, and those employees designated in Section A of the Memorandum of Understanding dated March 29, 1961.

During 1978, the employer reopened the Arlington plant under the management of a newly created division of the company called the "Commercial Division". The union has asserted that the employees in the reopened Arlington facility are covered by the Collective Bargaining Agreement of 1978 of the Garland Division by virtue of the Recognition Clause and the reference to the Memorandum of Agreement dated March 29, 1961. The company disputes this contention on the ground that under the Letter of Understanding dated

February 3, 1972, the Garland contract applies only if the Arlington facility is operated under the "Garland Division".

The union filed grievances with the company which raised the basic question of whether the Arlington employees were covered by the Garland collective bargaining agreement. The company rejected these grievances on the ground that the contract was not applicable. The union then instituted a demand for arbitration under the arbitration provisions of the contract. The company, in turn, refused to participate in submitting the issue to arbitration.

The union brought suit in federal court under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), to enforce the contract agreement to arbitrate. The District Judge granted the union's Motion for Summary Judgment ordering the defendant to arbitrate the grievances at issue.

The substantive issue between the parties is an issue of contract interpretation. The current collective agreement refers to a Memorandum of Agreement which does state that the contract is to cover employees at the Arlington facility. On the other hand a Letter of Understanding dated 1971 indicates that the Garland contract is to cover Arlington employees, in the event that the plant is reopened, only if the Arlington plant is operated by the Garland Division.

The parties have agreed in their collective bargaining agreement to submit disputes concerning the interpretation and application of the agreement to arbitration. The fact that the issue is in a sense a "jurisdictional" one as to whether the contract covers the particular employees is not a limitation upon the promise to arbitrate. It is true that if the contract does not and cannot cover the employees at Arlington, an arbitration award to the contrary could not stand. But it is now well established that such jurisdictional issues are to be submitted to the arbitrator in the first instance.

In 1960 the United States Supreme Court decided the now well-known Trilogy of cases outlining the relationship between the courts and labor arbitrators under section 301 of the Labor Management Relations Act. *United Steelworkers*

of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. The *Warrior & Gulf* case dealt with the issue of the role of the arbitrator in a case where his or her jurisdiction to hear the case is in dispute. While recognizing that the ultimate decision on arbitrability lies in the court, the court went on to say: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 363 U.S. 582, 80 S.Ct. at 1353. It is now well recognized that the issue of arbitrability is submitted first to the arbitrator for decision if the contract is susceptible to an interpretation which provides for arbitration of the particular issue.

The ambiguity in this contract is manifest. The reference back to the 1961 agreement in the 1978 contract Recognition Clause, when the company was at the same time preparing to reopen the Arlington facility, raises a genuine question about whether the 1972 Letter of Understanding controls.

The District Court made the finding that the Recognition Clause and its reference to the Memorandum of Agreement of 1961 did control, and that the Garland contract did cover the Arlington employees at the reopened plant. This finding was not necessary and should be set aside as deciding an issue which is to be submitted to arbitration. It is for the arbitrator to decide this issue under the principles of *Warrior & Gulf, supra, and see International Brotherhood of Teamsters v. Braswell Motor Freight*, 392 F.2d 1 (5 Cir. 1968). The decision of the arbitrator is, of course, subject to judicial review under the usual standards for such cases.

The appellant also argues that the issue of the scope of the bargaining unit is one which could be resolved by the National Labor Relations Board, and therefore the union's exclusive remedy was with the Board. It is well established, however, that the existence of a possible remedy with the

Board does not bar suit for enforcement of the collective contract under section 301 of the Act. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964).

The finding of the District Court that the collective agreement between the parties covers the employees of the Arlington facility is set aside. The judgment of the District Court directing arbitration of the grievances involved in this case is AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 80-1395
Summary Calendar

D. C. Docket No. CA 3 79 0255 C

INTERNATIONAL UNION, et al.,
Plaintiffs-Appellees,

VERSUS

E-SYSTEMS, INC.
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IT IS FURTHER ORDERED that the defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 8, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1395

INTERNATIONAL UNION, et al.,
Plaintiffs-Appellees,

VERSUS

E-SYSTEMS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(January 8, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

J. E. Williams
United States Circuit Judge

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office of the Clerk

January 23, 1981

Mr. Bowen L. Florsheim
Attorney at Law
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No. 80-1395

INTERNATIONAL UNION

v.

E-SYSTEMS, INC.

MANDATE STAYED TO AND INCLUDING FEBRUARY 22, 1981

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, F.R.A.P.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should

not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Linda St. Pierre
Deputy Clerk

Encls.

cc: Ms. Lynn Marie Crider

APPENDIX B

STATE OF TEXAS
COUNTY OF DALLAS

Before me, the undersigned authority, personally appeared Mr. W. R. Ersthaler, known to me to be the person whose name is subscribed below, and, after being by me first sworn, on oath, stated and deposed as follows:

"I am W. R. Ersthaler, am over the age of eighteen (18) years and am in all regards competent to testify herein as to the matters stated below. I am and at all times specified in this affidavit, have been the Director of Industrial Relations for the Garland Division, E-Systems, Inc., located in Garland, Texas. As Director of Industrial Relations for the Garland Division, E-Systems, Inc., I am thoroughly familiar with the collective bargaining policies and practices of the Garland Division and of E-Systems, Inc. and I am familiar with and have participated in collective bargaining negotiations between the Garland Division, E-Systems, Inc. and Local Union 848, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, at all times specified below.

"E-Systems Inc. historically has conducted its operations through various separate and distinct Divisions. Among the Divisions currently operating in the Dallas, Texas area are the Garland Division, the Greenville Division and the Commercial Division. Each of these Divisions is and at all times during their existence, have been independent operating units unrelated to one another in any form of operational sense. Most especially, each Division historically has conducted its own personnel and employment activities including, but not limited to, all collective bargaining activities engaged in by the particular Division. Those Divisions whose employees are represented by Union, negotiate and enter into their own collective bargaining agreement with their respective Unions without reference to what is or may be done at another Division. For example, the Garland Divi-

sion historically has had a collective bargaining relationship with Local 848 of the UAW while at the same time various employees of the Greenville Division are represented by Local 967 of the UAW and other Divisions are represented by different Locals of the UAW and by other totally different Unions in certain cases.

"During a corporate reorganization which occurred in 1972, E-Systems Inc. was 'spun-off' of the Ling-Temco-Vought conglomerate. As part of the spin-off, E-Systems Inc. acquired both the Garland Division facilities in Garland, Texas and plant facilities located in Arlington, Texas. At the time of the spin-off, employees at the Arlington, Texas plant were under a collective bargaining agreement with a different Union Local which represented Grand Prairie, Texas facilities of Ling-Temco-Vought, Inc. After the spin-off, for purposes of administrative convenience and because the Arlington, Texas facilities were being used to perform work for the Garland Division, employees at the Arlington facilities were brought under the collective bargaining agreement then covering Garland, Texas employees. At this time, the Arlington facilities were managed and operated by and as a part of the Garland Division.

"During the summer of 1971, the Arlington facilities were closed and all operations being conducted there were moved either to the main Garland, Texas plant or to a new Division in Utah. E-Systems Inc. did not conduct further operations in the Arlington plant facilities for the next several years. When the Arlington facilities were closed, management of the Garland Division lost all control and responsibility over those facilities and had nothing further to do with them in any regard.

"Shortly after the closing of the Arlington facilities, the Garland Division and Local 848 of the UAW entered into collective bargaining negotiations for a new collective bargaining agreement. Because the Arlington facilities had been closed and were no longer operated by the Garland Division the parties agreed during negotiations to delete from the collective bargaining agreement all references to the Arling-

ton facilities and agreed that they were not part of the collective bargaining unit. As an addendum to the collective bargaining agreement, however, Garland Division and Local 848 of the UAW entered into a letter of understanding dated February 3, 1972, a copy of which is attached hereto as Exhibit A, and incorporated herein by reference for all purposes. By that letter, the parties agreed that *if the Garland Division resumed its operations* at the Arlington facility, then and only in that event, would the Arlington plant be returned to the collective bargaining agreement. At no time since the execution of that letter addendum has the Garland Division resumed any operations at the Arlington facilities. Subsequently, during negotiation for a new collective bargaining agreement in 1975, the parties agreed to delete the February 3, 1972 letter of understanding and since that time it has not been part of any collective bargaining agreement and has been null and void and with no force or effect.

"I am aware that E-Systems Inc. has recently established a new Commercial Division which has a position in the overall E-Systems organization similar to that of the Garland Division and other independent operating Divisions. The Commercial Division was formed to enter into new markets and perform work and manufacture products different from those of the Garland Division. The Commercial Division and the Garland Division are totally independent of each other, the management of the Garland Division has no control or operating power of any kind with regard to the Commercial Division, and most particularly, the personnel and employee relations operations of the Commercial Division are not in any way affected or controlled by the Garland Division.

"The Garland Division does not now and since mid-1971 has not had any form of operations or contact with the Arlington, Texas plant facilities herein in question. Garland Division has no employees and does not conduct any form of operations at the Arlington facilities which are now operated solely by the Commercial Division.

"In August, 1977, prior to the commencement of negotiations for the current collective bargaining agreement between

Local 848, UAW and Garland Division, I personally met with representatives of Local 848, UAW, and informed them that I had been advised that the Commercial Division was being formed and that it would take over and operate in the Arlington plant facilities. I told the Union representatives that the Commercial Division was a totally separate Division, in no way connected with Garland Division. At no time subsequent to that meeting did Local 848 of the UAW or any of its representatives seek to negotiate concerning anything occurring at the Arlington facilities or in any way seek to negotiate concerning the Commercial Division. All negotiations were limited to the Garland Division and its own operating facilities."

W. R. Ersthaler
Director of Industrial Relations
Garland Division, E-Systems Inc.
Affiant

Sworn to and subscribed before me, a Notary Public in and for Dallas County, Texas on this the 12th day of October, 1979.

Notary Public in and for
Dallas, County, Texas
GRIEVANCE

GRIEVANCE

In reopening the Arlington, Texas facility, the employer has violated the Agreement between the parties by refusing to recognize the Union or apply the terms of the Contract. Article III (Recognition), Article IV (Representation Duties and Responsibilities), Article VIII (Seniority), Article XI (Job Classification, Occupations and Labor Grades), Article XVII, Section I (Excluded Employee Working), Section 4 (Non-Discrimination), and other provisions to be ascertained namely the entire Contract including Benefit Addendums.

The Union requests the Company to apply the Contract to the Arlington, Texas facilities and to make whole all employees injured by the violations.

B-5

3 February 1972

To: Mr. Roy D. Kinney
International Representative
UAW
310 Oak Cliff Bank Building
400 S. Zang Boulevard
Dallas, Texas 75208

Mr. B. J. Meeks
President — Local 848 UAW
Box 531
Grand Prairie, Texas

Dear Sirs:

During the 1971 negotiations it was agreed that all references to the Arlington, Texas plant would be deleted from the Collective Bargaining Agreement. This was on the basis that the Garland Division's Arlington facility located on Avenue F, East, in Arlington, Texas, was discontinued during May and June of 1971.

It was further agreed between the parties during these negotiations that should the Garland Division resume operations at this facility in the future, references to the Arlington plant will be returned to the Collective Bargaining Agreement concerning coverage and application of the Agreement.

Very truly yours,

W. R. Ersthaler
Director of
Industrial Relations

ACCEPTED AND APPROVED BY THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

R. D. Kinney
International Representative

B. J. Meeks
President, UAW Local 848

MAR 198

No. 80-1410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

E-SYSTEMS, INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL UNION 848,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR UAW & its LOCAL 848

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Must a court, on application for an order to compel arbitration of a dispute involving the applicability of the collective bargaining agreement to one of an employer's facilities, decide, as a matter of subject matter arbitrability, whether the agreement in fact was intended to cover the plant?

2. Does the jurisdiction of the National Labor Relations Board to decide representation questions deprive a District Court of the power to enforce a contractual duty to arbitrate a dispute concerning the intended scope of a collective bargaining agreement?

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BRIEF IN OPPOSITION FOR UAW & its LOCAL 848

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local Union 848, respectfully request that the Court *deny* the Petition for Writ of *Certiorari.*

OPINIONS BELOW

The Memorandum Opinion of the District Court for the Northern District of Texas has not been reported. It is reproduced in the Appendix to the Petition at A-1. The Opinion of the Court of Appeals for the Fifth Circuit is reported at *UAW & its Local 848* v. *E-Systems, Inc.*, 632 F. 2d 487 (5th Cir. 1980).

COUNTERSTATEMENT OF THE CASE

The Union,[1] initiated this action when the Employer[2] refused to arbitrate two grievances filed pursuant to their collective bargaining agreement. The dispute underlying the grievances is whether or not the 1978 collective bargaining agreement controlling at the Employer's Garland, Texas facility also applies at its closed, then reopened Arlington, Texas plant. The Union contended that the agreement applies at Arlington, the Employer that it does not.

The agreement provides for binding arbitration of all disputes requiring the interpretation or application of the agreement. Nevertheless, the Employer refused to arbitrate, arguing that the subject matter of the dispute was not arbitrable and that, even if it were, the dispute was within the exclusive jurisdiction of the National Labor Relations Board (N.L.R.B.).

The Employer, through its Garland Division, for many years operated plants at *both* Garland and Arlington, Texas. The Union represented employees at both facilities. At all times, a *single* collective bargaining agreement applied at both plants.

In early 1971, however, the Employer closed the Arlington plant. Later that year, during negotiations for a new agreement, the parties agreed to eliminate the reference to the Arlington facility. They agreed that the contract would apply at Arlington should the Employer resume operations there. This agreement was embodied in a Letter of Understanding dated February 3, 1972.

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[1] The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 848.

[2] E-Systems, Inc.

The Employer also, as a part of the collective bargaining agreement, continued to recognize the Union as bargaining representative for "the employees as designated in the N.L.R.B. Certification dated January 25, 1951 and those employees designated in Section A of the Memorandum of Understanding dated March 29, 1961", that is, for the Arlington as well as Garland employees.[3] The 1975 and 1978 agreements also include no reference to Arlington but maintained the broad recognition language.

On the Union's Motion for Summary Judgment, the parties offered conflicting evidence on the contract ambiguity. UAW International Representative Roy Kinney stated that the parties had agreed independent of any particular collective bargaining agreement that, if the plant reopened, it would be covered by the extant agreement. The Employer's Director of Industrial Relations averred that the parties had explicitly abrogated the 1972 Letter of Understanding during 1975 contract negotiations and that they intended that the Arlington plant, if reopened, would not be covered by the agreement.

In 1978 the Employer created a new division, the Commercial Division; reopened the Arlington facility as part of that Division; transferred some and hired other employees to conduct its operations; and established wages, hours and other conditions of employment without reference to the collective bargaining agreement. The Union filed grievances charging that the Employer had violated the agreement by failing to apply its terms at Arlington and by laying off bargaining unit employees at Garland while retaining less senior employees in the same job

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[3] The 1951 certification certified the International Union, UAW, as collective bargaining representative for a unit of employees at Garland, Texas. The Memorandum of Understanding dated March 29, 1961 provided for inclusion of employees located at Arlington, Texas in the established collective bargaining unit.

classifications at Arlington. The Employer refused to arbitrate the grievances.

The Union, following the rejection of each arbitration demand, filed suit to compel arbitration under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

The Employer moved to dismiss the action on the ground that the N.L.R.B. had exclusive jurisdiction of the subject matter of the grievances. The Union filed a Motion for Summary Judgment. The District Court denied the Motion to Dismiss, granted the Union's Motion for Summary Judgment, and ordered arbitration. The District Court held:

> The subject matter of the grievances sought to be arbitrated is within the scope of the agreement: the recognition clause provides that the UAW is exclusive bargaining representative of all covered employees, the employees covered by the agreement include employees at the Arlington facility, and the agreement establishes rules governing the order of layoff and other terms and conditions of employment.[4]

The Employer appealed. The Fifth Circuit held that the question of the coverage of the agreement turned on an ambiguity in the contract, which must be left to the arbitrator to decide. The Court of Appeals affirmed the order to arbitrate.

REASONS FOR DENYING THE WRIT

This case poses the question whether, under these particular facts, this Employer is required to submit this dispute, over the interpretation of a collective bargaining agreement, to an arbitrator.

The Employer wants a judicial, rather than arbitral, resolution of the contract interpretation issue at the heart

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[4] Appendix to the Petition at A-2.

of the grievances—whether or not the parties intended the terms of their agreement to be applied at Arlington, Texas. In the alternative, the Employer seeks a holding that the question cannot be arbitrated at all, but must be presented to the N.L.R.B.

This is a common refrain, often heard from those, whether union or management, who are, in a given instance, unhappy with their agreement to arbitrate. But the Court has established clear rules governing the role of the judiciary in resolving questions both of subject matter arbitrability and of representation. The Court of Appeals has applied them here, and has applied them correctly. Therefore, review is unnecessary.

I. THE LEGAL PRINCIPLES CONTROLLING THE DECISION OF THIS CASE ARE SETTLED.

Twenty years ago, this Court established the standard for determining whether a court should order a party to arbitrate a grievance. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). That standard has not changed. Nor has there been any dispute among the Circuits as to how the standard should be, as here, a case involving the applicability of the terms of an agreement at a particular location. In each reported case involving a broad, general arbitration clause, the Court of Appeals has ordered the issue arbitrated.

The relationship between the N.L.R.B.'s jurisdiction to decide questions of representation, and the arbitrator's authority to interpret the contract, is equally well settled. The Board's jurisdiction does not diminish the obligation to arbitrate. The arbitrator's authority remains intact, absent direct conflict with a ruling of the Board. *Carey* v. *Westinghouse Corporation*, 375 U.S. 261 (1964). The Circuits have applied *Carey* consistently, in exactly the fashion it was applied here.

II. THE COURT OF APPEALS APPLIED THE CONTROLLING LEGAL PRINCIPLES CORRECTLY.

The Fifth Circuit recognized that, under established law, it is required to order arbitration of a grievance unless the arbitration provision of the collective bargaining agreement *expressly* excludes the subject matter of the grievance. The Court below found that the agreement between E-Systems and the Union did *not* expressly exclude the subject matter at issue in the Union's grievance. The Employer has not challenged that finding. Nor has it challenged the Court's finding of ambiguity on the substantive issue to be submitted to the arbitrator—whether the agreement applies at Arlington.

Recognizing the ambiguity of the agreement, the Employer still urges that the District Court should have denied the Motion for Summary Judgment and taken upon itself that contract interpretation issue. Had the Court of Appeals ordered the District Court to try the merits of the dispute, it would have robbed the Union of their right to resolution of the dispute by an arbitrator and ignored the teaching of *United Steelworkers of America* v. *American Manufacturing Co., supra.* The Court below correctly affirmed the arbitration order.

The Court of Appeals ruled that *Carey* v. *Westinghouse Corporation, supra,* controls this case. The Petitioner has not argued that the representation issue posed by the Union's grievances is so different from that posed by the grievance in *Carey* that this Court's ruling therein is not applicable.

CONCLUSION

For the foregoing reasons, the Court should *deny* the Petition.

Respectfully submitted,

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March 20, 1981